SYKT. JAYA

v.

STAR PUBLICATIONS (M) BHD.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL SUIT NO. 283/75]
2 AUGUST 1989

CONTRACT: *Termination of agency contract - Whether plaintiffs had cause of action - Agreement for indefinite period - Subject to termination by reasonable notice - Whether notice reasonable - Calculation of damages.*

In March 1971, one Liew Kok Hong, the sales manager of the defendants who were the proprietors and distributors of a daily newspaper called 'the Star' and 'the Sunday Star' entered into two agreements with the plaintiff who was a partnership firm carrying on the business of newspaper distributors and sales agent whereby the plaintiffs were appointed the sole agents of the defendants for the purpose of effecting the sales of their newspapers one in respect of the states of Kedah and Perlis and the other in respect of the State of Perak each for a period of three years but terminable after the first year upon three months notice in writing.

In September 1971, the two agreements were by mutual consent cancelled and replaced by two almost identically worded agreements except that they were each for an unspecified period and there was no provision for termination by notice. In a letter addressed to the plaintiffs, the defendants' solicitors referred to the March agreements and asserted that the sole agency contract was at an end having expired by effluxion of time on 3 March 1974. However, they offered to continue the sole agency on a year to year basis. In reply the plaintiffs declined the offer. The defendants then informed the plaintiff that the agency agreement for three years had expired on 2 March 1974 and that their client did not wish to renew the agency agreement. A formal notice, dated 30 August 1975, that the March agreement would be terminated, was sent. The defendant contended that the plaintiff had no cause of action because when the writ was issued on 23 June 1975, the sole agency agreement had not yet been determined since the termination was effected by letter dated 30 August 1975. It was also contended that even though the September agreement on the face of it was for an indefinite duration, they were impliedly subject to termination by reasonable notice and that reasonable notice had in fact been given and therefore that the termination was lawful.

Held:

[1] The letter dated 30 August 1975 was a formal notice of termination confirming an earlier repudiation of contract. Therefore the plaintiff had a cause of action at the date the writ was issued.

[2] The reasonable period for the sole agency agreement was at least five years. By offering the plaintiffs a year to year contract, the defendants had evinced an intention to carry out the contracts in a way substantially inconsistent with their contractual obligations and so to deprive the plaintiffs of substantially the whole benefit of the contracts concerned. The plaintiff were thus entitled to treat the contract as discharged by breach and to issue the writ herein.

[3] Having regard to the circumstances of the case, the expedition and time spent by the plaintiff and the desirability of a period of adjustment of business, a reasonable period of notice of termination would be six months.

[4] The normal measure of damages will be the amount that the agent might reasonably have earned under the contract had he not been prevented from continuing to act. Any payments of commission by the plaintiff to their own agents is not relevant to the question of the assessment of damages as between the plaintiffs and the defendants.

[Judgment for the plaintiffs with costs.]

Cases referred to:
Papps v. Mahon [1966] NZRL 282
Ang Koon Kau & Anor. v. Lau Piang Ngong [1985] CLJ (Rep) 24
Laws v. London Chronicle Ltd. [1959] All ER 285
J.K. Sayani v. Bright Brothers (P) Ltd., Bombay [1980] 1 Madras LJ 130
Quek Chek v. Majlis [1986] 2 MLJ 290 (SC)
Sohrabji Dhunjibhoy Medora v. Oriental Government Security Life Assurance Co. Ltd. [1946] 72 IA 315
Martin-Baker Aircraft Co. Mirosen [1955] 2 All ER 722
Inchbald v. Western Neilgherry Coffee Co. [1864] 17 CB 733
Trollope v. Martyn [1934] 2 KB 436
Luxor v. Cooper [1941] AC 108

Legislation referred to:
Contracts Act 1950, s. 159
Civil Law Act 1956, s. 11
Rules of the High Court 1980, O. 42 r. 12

Other sources referred to:
Bullen & Leake on Precedents of Pleadings, 12th Edn., p. 57
Bowstead on Agency, 15th Edn., p. 529
Atkin's Court Forms, 2nd Edn., Vol. 4, p. 31 footnote

For the plaintiff - Gan Teik Chee; M/s. Gan Teik Chee & Ho.
For the defendant - R. Manecksha; M/s. Lim Kean Siew & Co.

JUDGMENT

Edgar Joseph Jr J:

At all material times to this suit, the plaintiffs were a partnership firm carrying on, *inter alia*, the business of newspaper distributors and sales agents in Alor Setar in the State of Kedah while the defendants were the proprietors and publishers of a daily newspaper called "the Star" and a Sunday newspaper called "the Sunday Star".

In March 1971, one Liew Kok Hong, the sales manager of the defendants, entered into two separate but almost identically worded agreements in writing dated 3 March 1971, being Exhibits P1 and P2 ("the March agreements") whereby the plaintiffs were appointed the sole agents of the defendants for the purpose of effecting sales of their newspapers aforesaid, one in respect of the States of Kedah and Perlis and the other in respect of the State of Perak, each for a period of three years but expressed to be terminable after the first year upon three months' notice in writing and upon other terms and conditions appearing therein.

However, in September 1971, the two agreements aforesaid were, by mutual consent, cancelled and replaced, by two almost identically worded agreements dated 1 September 1971, being Exts P3 and P4 ("the September agreements") in *pari materia* with their predecessors, except that they were each for an unspecified period and there was no provision for termination by notice.

But then, in a letter dated 26 April 1975, addressed to the plaintiffs, the defendants' solicitors referred to the March agreements and asserted that the sole agency contract was at an end having expired by effluxion of time on 3 March 1974. However they offered to continue the sole agency on a year to year basis.

In answer to that letter the plaintiffs replied by letter dated 2 May 1975, declining the offer and expressing the hope "that your clients will understand our position and give us sympathetic consideration to carry on our dealings with the existing agreements."

The defendants however adopted a hard line for by a letter dated 31 May 1975 their solicitors replied stating that the agency agreement for three years had expired on 2 March 1974 and adding that it was not their clients intention to renew the agency agreement but, to avoid inconvenience to the plaintiffs, and to enable them to wind up their business, the defendants would continue to supply the newspapers concerned until 30 June 1975.

The defendants' solicitors followed this up with a letter dated 30 August 1975 addressed to the plaintiffs giving formal notice that the March agreements would be terminated three months from the date thereof.

The plaintiffs then issued the writ herein claiming an injunction restraining the defendants from discontinuing the supply of the newspapers concerned to the plaintiffs under the September agreements, for damages for breach of contract and interest thereon.

Although by their defence the defendants first took the position that the September agreements were not binding on them on the ground that Mr. Liew Kok Hong, had no authority to enter into the agreements on their behalf, at the hearing before me, the defence confined its contention to asserting that the September agreements even though on the face of them for an indefinite duration, were impliedly subject to termination by reasonable notice and that reasonable notice had in fact been given thereby terminating the same.

The first point taken on behalf of the defendants was that as at the date of the issue of the writ herein namely, 23 June 1975, the plaintiffs had no cause of action because the sole agency agreement had not yet been determined. It was pointed out that termination was effected by the letter dated 30 August 1975.

Now the expression "a cause of action" has been defined judicially to mean "all the facts and circumstances necessary to give rise to a right for relief in law or equity". (See *Papps v. Mahon* [1966] NZLR 288, 292 per Wilson J.

In reply, Counsel for the plaintiffs submitted, and I agree with him, that the letter dated 30 August 1975, "was only a formal notice of termination confirming an earlier repudiation of the contract" effected by the two previous letters from the defendants to the plaintiffs dated 26 April 1975 and 31 May 1975 hereinbefore mentioned.

I am satisfied therefore, that as at the date of the issue of the writ the plaintiffs had a cause of action.

The second point taken on behalf of the defendants was a pleading point; namely, that although according to *Bullen and Leake on Precedents of Pleadings*, 12th Edn., p. 57 in an action for damages for breach of contract, the contract as well as the breach must be distinctly stated, the statement of claim in the present case, had failed to set out that a claim was being made for damages for breach of contract.

Now, generally, a pleading point is not a good one where the omission to plead has not taken the other party by surprise. (See the Federal Court decision in *Ang Koon Kau & Anor. v. Lau Piang Ngong* [1985] CLJ (Rep) 24).

In the present case, although I am satisfied that the statement of claim was very far from being a model pleading, it was acceptable since it was obvious upon a perusal of it, that the plaintiffs claim was for damages for breach of the sole agency agreement. I am further satisfied that the defendants were not put to any disadvantage at the trial by the plaintiff's pleadings for even had the statement of claim been ideally drawn up, the evidence adduced not only on behalf of the plaintiffs but also that on behalf of the defendants would have been the same. This last point is emphasised by the fact that at no time did the defendants apply for further and better particulars of the plaintiffs' statement of claim.

The third point taken on behalf of the defendants was that the termination of the plaintiffs' sole agency agreement was lawful. It was argued that initially the defendants requested the plaintiffs to enter into fresh agreements and that it was because of the plaintiffs' refusal to do so that the defendants gave them notice of termination. It was further argued that no principal would allow his business affairs to be regulated by his agent and that when, as here, the principal feels threatened, the agency could surely be determined as the relationship involves trust and confidence which necessitate mutual satisfaction with each other's conduct.

It seems to me, that the plaintiffs had considerable justification for refusing to enter into the fresh agreements proposed by the defendants.

In this context I would refer to the relevant contemporary correspondence.

By a letter dated 26 April 1975 (AB p. 5) the defendants' solicitors wrote to the plaintiffs as follows:

> Mr. Teo Kooi Wah
> Syarikat Jaya,
> No. 1563, Jin Kota
> Alor Setar
>
> Dear Sir,
>
> **Agreement between Star Publications (M) Sdn. Bhd. & Teo Kooi Wah of Syarikat Jaya**
>
> We are instructed to refer you to an agreement dated 3 March 1971, and to inform you formally that the contract of agency between your clients and our clients is at an end, the term having expired on 3 March 1974, but that you have been distributing papers for our clients since then without a contract.

In order to regularise the relationship between your clients and ours, we are further instructed to inform you that our clients will continue your agency with our clients on a year to year basis, provided that you enter into a proper agreement with our clients.

Kindly let us have a reply within one week from the date of receipt hereof.

Yours faithfully,

Sd. Lim Kean Siew & Co.

That letter evoked the following response from the defendants by a letter dated 2 May 1975 (AB p. 6) as follows:

Lim Kean Siew & Co.,
Rm 53, 5th Floor,
Bangunan Bank Negara,
Penang.

Dear Sirs,

Agreement between Star Publications (M) & Teo Kooi Wah of Syarikat Jaya

Your letter dated 26 April 1975 refers.

As regards the above agreement signed in 1971, I wish to point out that there is no expiry date. Perhaps it is relevant for me to relate the then conditions and the difficult situation of the Star when the agreement was entered into. The Star being newly established, had encountered many teething problems at its early stage of operations. It was difficult to obtain agents and impossible to appoint them on year to year basis. My clients had shouldered the task role of marketing and entered into the contract with the objective of establishing an efficient distribution network for the Star.

It is pleased to note that today, as a result of improved management the sale of the newspaper has gradually increased within a few years.

Likewise, our concern for the newspaper has grown and we are working out plans to achieve even greater sales. A new agreement signed on yearly basis will lower the efficiency, the performance and the confidence of all the agents and the sub-agents and is against the interest of the newspaper in the long run.

Also I wish to draw your attention to clause no. 13 of the above mentioned agreement which provides certain conditions sufficient for your clients to exert control on our performance.

In the light of the foregoing, I sincerely hope that your clients will understand our position and give us your sympathetic consideration to carry on our dealings with the existing agreement. We hope we could maintain the close cooperation and the good relationship which we have enjoyed with your clients for mutual benefit.

Yours faithfully,
sgd. Teo Kooi Wah
c.c. Star Publications (M) Sdn. Bhd.

At the trial, the plaintiffs adduced evidence to show why a year to year contract such as that offered by the defendants to the plaintiffs would have been substantially inconsistent with the obligations incurred under the September agreements so as to deprive the plaintiffs of virtually the whole benefit of the contract thus bringing themselves within the principles enunciated in *Laws v. London Chronicle Ltd.* [1959] 2 AER 285. In particular, evidence was adduced to show that in reliance upon the expectation encouraged by the defendants that the sole agency agreement was to be for

an unlimited period, the plaintiffs had, from inception, ploughed much capital and effort, especially during the early years, to establish an efficient distribution network and a viable market for newspapers which are entirely new to the reading public in the regions concerned.

I do not propose to delve into the relevant testimony as to these matters. Suffice it to say that I find the same to be both reasonable and probable and I have therefore no hesitation in accepting the same as true.

That being my view of the evidence, the question which arises for decision regarding this part of the case is: what is the period for which the sole agency agreement was to run? This question is not free from difficulty.

Teo Kooi Wah (PW1), the manager of the plaintiffs testified, when asked to explain the deletion of the words "for the period of 3 years from the date hereof" in clause 1 of P2, said that the deletion was made by the defendants' manger K.K. Liew shortly before the commencement of the publication of the newspaper. He added that this came about as a result of his asking Liew for an agency period of 10 years instead of 3 years. Liew agreed to this and went further to say that if the defendants did their work properly they could have an agency for as long as they liked. It was in these circumstances that Liew made the deletion concerned - so he said. Similarly, Teo testified that the corresponding amendments appearing in P1 were made at the same time by Liew and for the same reason. He further explained that it was the amendments made to the March agreements P1 and P2 which gave them an untidy appearance. The September agreements (P3 and P4) were typed out by Liew's niece a Miss Ang Boon Ee and these incorporated the amendments concerned. It was, of course Miss Ang who witnessed Liew's signature.

In these circumstances, Counsel for the plaintiffs submitted that a reasonable period for the sole agency agreement considering the circumstances would be from seven to ten years. Counsel for the defendant does not appear to have addressed this question.

For my part, doing the best I can, I consider that a reasonable period for the sole agency agreement was at least five years and I so hold.

It follows that by offering the plaintiffs a year to year contract, the defendants had evinced an intention to carry out the contracts in a way substantially inconsistent with their contractual obligations and so to deprive the plaintiffs of substantially the whole benefit of the contracts concerned. (See *Law's* case *ibid*). The plaintiffs were thus entitled to treat the contract as discharged by breach and to issue the writ herein.

The next question which arises for decision is what was the required period of notice of termination for the September agreements.

My attention was directed to s. 159 of the Contracts Act 1950 (Revised-1974) which provides that reasonable notice must be given of revocation and renunciation of the agency agreement otherwise the damage thereby resulting to the agent must be made good.

Counsel for the defendants submitted that three or six months' notice of termination would be sufficient and cited in support *J.K. Sayani v. Bright Brothers (P) Ltd., Bombay* [1980] 1 Madras LJ 130 and *Quek Chek v. Majlis* [1986] 2 MLJ 290 (SC)

On the other hand, Counsel for the plaintiffs submitted that the minimum period of notice of termination should be one year and cited in support *Sohrabji Dhunjibhoy Medora v. Oriental Government Security Life Assurance Co. Ltd.* [1946] 72 IA 315 and *Martin-Baker Aircraft Co. Mirosen* [1955] 2 All ER 722.

In my opinion, having regard to the circumstances of the case as a whole, not forgetting the expedition and time spent by the plaintiffs and the desirability of a period of adjustment of business, (see *Bowstead on Agency*, 15th Edn., p. 529), which I have referred to and discussed, Counsel for the defendants is correct insofar as this part of the case is concerned, and I would accordingly uphold his submission that a reasonable period of notice of termination would have been six months.

I must next consider the measure of damages to which the plaintiffs are entitled. In actions such as the present one, it is clear law that the normal measure of damages will be the amount that the agent might reasonably have earned under the contract had he not been prevented from continuing to act. (See, for example *Inchbald v. Western Neilgherry Coffee Co.* [1864] 17 CB 733 and *Trollope v. Martyn* [1934] 2 KB 436 which although generally discredited on the issue of liability in view of their treatment by the House of Lords in *Luxor v. Cooper* [1941] AC 108 are still illustrative on the question of damages.)

It is with the above principles in mind that I turn to examine the evidence relevant to the issue of the measure of damages.

It was alleged by Counsel for the plaintiffs, and not challenged by Counsel for the defendants, that the statement of accounts, being P19 and P19A, disclosed that during the first eleven months of the year 1975, the plaintiffs did earn a net commission of RM96,411.87 cents. Counsel for the plaintiffs also directed my attention to the June 1976 and the 1977-1980 annual reports of the defendants themselves as supporting this aspect of the plaintiff's claim.

Counsel for the defendants did not attempt to contest the figures appearing in the contemporary documents relied on by Counsel for the plaintiffs but he did take the point that the plaintiffs' claims were really for special and not general damages and as such, ought to have been, but were not specifically pleaded. He also took the point that the sum claimed by the plaintiffs did not take into account the commissions the plaintiffs would have had to pay to their own agents.

Now, in claims of the present kind, the assessment of damages is often not free from difficulty and it is not easy to give particulars as there is a strong element of contingencies involved in quantification. Accordingly it is simpler to put the claim generally, leaving it to the defendant, if he thinks fit, to apply for particulars, though ideally, it would be better, whenever possible, to formulate the claim with particulars, however tentative. In the Commercial Court in the United Kingdom particulars in cases of this sort have been ordered to be delivered; in which case they should then be stated in the form of an estimate. (See p. 31 footnote Atkins Court Forms, 2nd Edn., Vol. 4).

As for Counsel for the defendants' next point, I do not consider the fact that the plaintiffs would have to pay commission to their own agents, relevant to the question of the assessment of damages as between the plaintiffs and the defendants. In my opinion, any question which may arise as to the payment of commission by the plaintiffs to their own agents would have to form the subject of separate proceedings between them.

I must now determine the appropriate sum to award to the plaintiffs. Having regard to my findings that the reasonable period for the sole agency agreement was five years (of which the unexpired term was only one year) and that a reasonable period of notice of termination of the same was six months, the award for damages should be RM105,176.40 (RM105,176.40 x 1½ less 1/3, to take into account contingencies) and I so order.

The judgment sum will attract interest at the rate of 8% p.a. from the date of accrual of cause of action to date of judgment pursuant to the provisions of s. 11 of the Civil Law Act 1956, and thereafter at the rate of 8% p.a. to the date of realisation pursuant to O. 42 r. 12 of the Rules of the High Court 1980.

The defendants must also pay to the plaintiffs the costs of the action.

Also found at [1990] 1 CLJ 155